IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.52 OF 1988

Sayajirao Baburao Gharge
agriculturist, resident of
Upale Mayani, Tal : Khanapur
Dist: Sangli ..Appellant

versus

1. Narayan Mahadeo Gharge
2. Shankar Narayan Gharge
3. Vishnu Narayan Gharge
4. Sudhakar Narayan Gharge
5. Indubai Narayan Gharge

All Agriculturists, of
Village Upale Mayani,
Tal : Khanapur,
Dist: Sangli.
..Respondents.

Mr. R.S.Khadankar for the Appellant

Mr. P.L. Naik for the Respondents 1 to 4

Coram : S.R.Sathe, J.
Dated : 23rd June, 2006

JUDGMENT.

1. Appellant, the Original Plaintiff in Regular Civil Suit No.61 of 1977 has preferred this appeal against the judgment and order passed by the Court of Second Additinal District Judge, Sangli, whereby the appeal was partly allowed and decree for

permanent injunction passed in favour of plaintiff and against the defendants 1 to 5 was set aside. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:

. The suit property described in detail in para 1 of the plaint bearing Gram Panchayat No.134, situated at Kuple Maine, Tal: Vita, was originally owned by defendant No.6. The defendant Nos.2 to 4 are the sons of defendant No.1. while defendant No.5 is the wife of defendant No.1. It is the plaintiff's case that he purchased the suit property which is a open space, from the defendant No.6 for Rs.300/-. The defendants 1 to 5 were not at all concerned with the suit property. According to plaintiff the defendants 1 to 5 are Goondas and they behaved rudely in the village. On 25.1.1977, they obstructed plaintiff's possession of the suit property. Hence plaintiff filed the present suit on 18.4.1977.

3. On the date of filing of the suit, plaintiff

also submitted an application Exhibit 6 for temporary injunction and the Court was pleased to grant temporary injunction against defendant Nos.1 to 5 with show cause notice to them returnable on 20.4.1977.

4. The defendant No.1 filed his written statement as well as say to plaintiffs application for temporary injunction vide Exhibit 21 and opposed the plaintiff's claim. He contended that the description of the suit property given in the plaint is not correct. Though, plaintiff has called the suit property as open space, it is not so as per the existing situation. The defendant further contended that he is having his cattle shed, khop (hut), dunk pit and davan of permanent nature in the suit property. The defendants 1 to 5 are in possession of the same. The defendant Nos.2 to 5 adopted the written statement of Defendant No.1 by filing pursis to that effect.

5. The defendants 1 to 5 also denied that plaintiff has purchased the suit property from defendant No.6. According to them even if such sale deed has been executed, the contents of the same are

not correct because the defendant No.6 was not at all concerned with the property and he had no right to sale the suit property. They further contended that for last about 50 years the defendant No.6 was never in posession of the suit property and as such there is no question of plaintiff getting the possession of the same from the defendant No.6. On the contrary the suit property is all along in possession of the defendants 1 to 5 continuously as owner. They also denied plaintiff's allegation that they obstructed plaintiff's possession. The defendant's further contended that they have paid all along the taxes of the suit property. According to them on the basis of alleged sale deed plaintiff in fact started obstructing defendants possession, but as he could not suceed in that he took the matter to police. However, there also plaintiff did not suceed as he was not in possession. The defendants therefore prayed for the dismissal of the suit.

6. On these pleadings the trial Judge framed the issues at exhibit 22. In order to prove the suit claim the plaintiff examined himself at Exhibit 57 and one witness by name Tanaji Kumbhar at Exhibit

58. As against this the defendant No.1 examined himself at Exhibit 60 and witness Bali Mane at Exhibit 61.

7. After considering the evidence adduced by both the parties, the learned trial Judge came to the conclusion that the plaintifff has proved his title to the suit property and that he was in possession of the suit property on the date of the suit. As against this the defendant Nos.1 to 5 have no title to the suit property nor they were in possession of the suit property on the date of the suit. He, therefore, decreed the suit in plaintiff's favour.

8. Being aggrieved by the above mentioned order the defendant Nos.1 to 5 filed Civil Appeal No.77 of 1982. After considering the arguments advanced by both the learned Advocates, the 3rd Additional District Judge Sangli also held that plaintiff has proved his title to the suit property. He, further held that plaintiff has failed to prove that he was in actual possession of the suit property on the date of the suit. On the contrary the evidence on record shows the defendants possession over the suit

property. He, therefore, allowed the appeal partly and held that the order passed by the trial court with respect to declaration that plaintiff is the owner of the suit property is correct and therefore maintained the same and set aside the finding with regard to the plaintiffs possession and therefore dismissed the plaintiff’s claim for permanent injunction.

9. The original plaintiff has therefore filed the present second appeal challenging the order of the First Appellate Court rejecting the plaintiff’s claim for injunction.

10. From the perusal of the record it appears that while admitting the appeal this Court (Coram: D.K.Deshmukh, J.) has framed the following Substantial Question of Law " Whether in the facts and circumstances of the case, the learned Appellate Judge were justified in law in modifying the decree and finding on the question of possession, while upholding the decree and finding on the question of title of the appellant plaintiff".

11. In this appeal before me, the leared

Advocate for the Appellant- original Plaintiff has urged only two points. Firstly, he submitted that the learned Appelqte Judge has not properly appreciated the oral and documentary evidence of both the sides and his wrongly held that on the date of the suit the plaintiff was not in possession. Secondly, he canvassed before me that having once held that the plaintiff is the owner of the suit property and interim injunction was also granted in favour and continued till the disposal of the suit, the learned Appellate Judge should not have given importance to the Commissioners Report though it was to the effect that on the day of the Commission defendants 1 to 5 were found in possession. He, therefore, submitted that the Appeal be allowed and decree for permanent injunction be passed against the defendants. As against this the learned Advocate for the Respondents 1 to 5 suported the judgment and order passed by the first appellate court to the extent of permanent injunction and also submitted that the learned appellate Judge should have in fact held that the sale deed produced by the plaintiff is not duly proved as contemplated under ection 67 of the Evidence Act and as such it shold have been held that plaintiff has failed to prove

the title.

12. It is plaintiff's case that he has purchased the suit property by virtue of registered Sale Deed dated 10.1.1977 which is at Exhibit 63. It is tried to be suggested on the part of the defendants that the said sale deed is not duly proved. However, in order to substantiate this contention the learned Advocate for the respondents has placed reliance on a case **Prakash Mills Pvt. Ltd vs. Municipal Commissioner of Gr. Mumbai 1982 Mah, L.J. 840** wherein it is said that proof of signature of executant is not sufficient to prove the document. The correctness of the contents can only be proved by examining the executant. This proposition is not disputed and cannot be disputed. However, the facts of the said case and the facts of the case in hand are quite different. In the instant case, the plaintiff in whose favour the document is executed has categorically stated that his vendor has sold the said property to him under the sale deed Exhibit 63 which is written in his presence and also signed by the defendant No.6. Admittedly, this is a registered sale deed. The endorsement of the Registrar also shows that the executant admitted

before the Registrar that he has executed the sale deed in favour of Sayaji Baburao Gharge i.e. plaintiff. So, the above said ruling is of no use to the respondent original defendants. Both the courts below have rightly considred the sale deed and have correctly held that the plaintiff has proved the title to the suit property and that he has become the owner of tthe same from 10.1.1977.

12. The main and the material issue is whether plaintiff had actually received the possession of the suit property under the said sale deed or not. It is true that in the said sale deed it is mentioned that the possession is given. However, merely because it is mentioned acordingly in the sale deed one can’t jump to the conclusion that the plaintiff had actually received the possession. It must be noted that the defendants since beginning came out with a case that even the Plaintiff’s vendor Digambar Kulkarni was not in actual possession of the suit property for last 50 years and the property was in their possession during all these years. When such is the position, it was infact necessary for the plaintiff to adduce cogent and convincing evidence to show that on the date of

the sale deed he actually received the possesion. It was more necessary particularly when according to plaintiff the suit property is a open space. In fact, the evidence that has come on record indicates that the entire suit property is not open space but there is one hut and cattle shed in the suit property. What is more to be noted is that the defendant has even in his written statement which is filed at Exhibit 21_ has categorically stated that thre is such hut and cattle shed and dung pit as well as there is permanent (**Davan**) means the place made for tying the cattle. Considering this aspect importance must be given to the fact that though plaintiff had joined the vendor Digambar Kulkarni as defendant No.6, he has not come forward and has not supported the case of the plaintiff by saying that actual possession of the suit property was given to plaintiff or prior to the date of sale deed he was in actual possession of the suit property. On the contrary, it has come on record that Digambar Kulkarni was not at all residing in the village where the suit property is situated, but for a long period of about 20 years he was residing at Karad. So, under such circumstances, also it was necessary for the plaintiff to adduce sufficient evidence to

show his acutal possesion.

13. It is the case of the defendants that they have paid taxes of the suit property to the Gram Panchayat and the Gram Panchayat has issued receipts in his favour. The said receipts are produced by him at Exhibit 66 (for the year 1966-67) Exhibit 67 (for the year 1976-77) Exhibit 68 (for the year 1972-73). It is corect that all these receipts are not only in respect of the suit property but some other property numbers have also been mentioned in the said receipt. However, there is nothing on record to show that so far as the suit property number which is mentioned on the said receipt is wrong or that it has been obtained by the defendants by joining hands with the concerned person. So, when these receipts are issued by the Gram Panchayat in their routine office transaction, due weightage shall have to be given to the said extracts which indicate that the respondent defendants used to pay taxes for the suit property. It is true that the defendant No.1 was not able to state as to how he received the suit property bearing Gram Panchayat No.134. Not only that, he has also admitted that the said property was not belonging to his ancestor.

So, taking into consideration this aspect also both the courts below have held that so far as the title is concerned it is of the plaintiffs however they have failed to prove possession. Admittedly, the defendant nos.1 to 5 have not at all come out with a specific case that they have become the owners of the suit property by virtue of adverse possesion.

14. It must be noted that the plaintiff,s witness has supported the plaintiffs case by saying that the plaintiff is in possesion of the suit property while the defendants witness has supported the defendant No.1 by saying that he is in possession. As mentioned above, the conduct of the parties and the other circumstances, in fact indicate that the defendant Nos.1 to 5 were in actual possession of the suit property on the date of the suit.

15. There is another important piece of evidence which also lends support to the defendants contention. Admittedly, during the pendency of his suit Court Commissioner was appointed to visit the suit site and tofind out as to who is in possesion. Accordingly, the Court Commissioner visited the suit

property on 14.2.1981 and at that time one hut, cattle shed, cow dung pit and Davan were found in the suit property. It is pertinent to note that even in the written statement which is filed on 22.8.1977 the defendants 1 to 5 had categorically stated that they are in possession and there is hut, cattle shed etc. So, when such specific contention was taken by the defendans 1 to 5 it was in fact necessary for the plaintiff to get the Commissioner appointed at that very time. So, that would have falsified the defendants case, when now plaintiff is trying to submit that the defendants created all the cow dung put, cattle shed, etc about one month back prior to the date, the Commissioner visited the suit site. So, under to such circumstances the First Appellate Court has rightly given importance to the Commissioner's report Exhibit 38, which clearly indicates defendants possesion. It is very important to note that the plaintiff has filed the present suit for permanent injunction within three months from the purchase of the property. So, this also suggests that in all probabilities he must not have received actual possesion of the suit property and as the defendants were in possession, plaintiffs on the basis of the sale deed tried to obtain the

possession by filing such suit.

16. Much is made about the fact that the defendants did not submit an application to vacate ad interim exparte injunction which was granted against them. However, it must be noted that the defendants have filed their written statement and say to the application for temporary injunction wherein they have clearly stated that they are in actual possesion of the suit property and plaintiff is not in possession. So, merely beause no seperate application was filed for getting the ad-interim injunction vacated one cant jump to the conclusion that the defendants 1 to 5 were not in actual possesion. On the contrary, it must be noted that if according to plaintiffs defendants took the possession about one month prior to the appointment of the Commissioner then the Plaintiff would have pursued the matter and pointed out to the Court that inspite of the injunction order in opeartion the defendants have obtained forcible possesion and committed breach of injunction order and thereby committed Contempt of Court. But we find that no such steps have been taken by the plaintiff, but he only subsequently applied for appointment of the

Comissioner and that Commissioner's report is in fact in favour of the defendant. So,. having regard to these facts and circumstances and the evidence on record, I have no hesitation to hold that the first appellate court has righhtly appreciated the evidence on record and has correctly held that the plaintiff is not entitled for permanent injunction as prayed becase the defendants were in fact in actual posession of the suit property on the date of the suit. Naturally, the cross objections shall ahve to be dismissed. So, there is no necessity to interfere with the said finding.

17. In this view of the matter the second appeal is dismissed. So also the cross objections.

. Parties to bear their own costs.

(S.R.Sathe, J.)